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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. MICAH JEREMY LIGHTBURNER, Defendant and Appellant.	C060142 (Super. Ct. No. 06F2604)

Defendant was convicted of premeditated first degree murder and sentenced to an indeterminate term of 26 years to life. He appeals contending: (1) there is insufficient evidence to support either the premeditation finding or the murder conviction in general, (2) the trial court erred in failing to instruct adequately on defendant's right to resist a felony and on the lesser included offense of voluntary manslaughter, (3) the trial court improperly gave consciousness of guilt instructions, and (4) defense counsel's failure to object to

various arguments by the prosecutor amounted to ineffective assistance. We affirm the conviction.

FACTS AND PROCEEDINGS

Shortly after noon on April 5, 2006, defendant and his stepfather, Valentine Pesci, were inside the mobile home they shared in the Jones Valley area of Shasta County when defendant stabbed Pesci 18 times, seven times in the back and 11 times in the back and side of the head and neck area. Pesci died soon thereafter due to blood loss.

Defendant had moved in with his mother, C.O., and the victim a couple of months earlier. Prior to that, defendant had been living on the streets. Defendant was not working and there had been some friction between defendant and the victim.

At approximately 12:50 p.m. on April 5, E.O., a neighbor and friend of the victim, received a telephone call from the victim's home but nobody was on the line. She could hear C.O. in the background crying and heard the victim say twice, "Why baby? Why did you let him?" The victim sounded angry and scared. E.O. eventually concluded the victim and C.O. must be having an argument and hung up the phone. Two minutes later, E.O. received another call from the victim's home and this time spoke to C.O. E.O. could hear a male moaning in the background. E.O. tried to speak with C.O. but could barely understand what she was saying. She told C.O. to call 911.

E.O.'s husband, J.O., had planned to drive the victim into town that day. Around noon, he called the victim and told him he was running a little late. Sometime thereafter, J.O. pulled in front of the victim's home. As J.O. got out of his car, defendant came out the front door of the mobile home with a towel wrapped around his hand. There was blood on the towel, and defendant appeared shaken. Defendant unwrapped the towel, showed his hand to J.O., and asked if it "look[ed] bad." J.O. saw a laceration or puncture-type wound on defendant's hand. J.O. asked defendant what happened, and defendant replied: "[H]e attacked me. I just lost it. I think I killed him."

J.O. ran to the mobile home and entered. He saw the victim lying on the floor with C.O. "over the top of him, hysterical." There was blood all over the victim and C.O. C.O. was holding the victim's head and yelling and screaming, and J.O. could understand only half of what she was saying.

When J.O. first entered the mobile home, he heard the victim say J.O.'s name, and C.O. asked if J.O. would help her get the victim into the shower to clean him up. J.O. asked if anyone had called 911, and C.O. responded that "she didn't want anyone to go to prison." J.O. picked up the phone and called 911 himself.

J.O. spoke with the operator but, because he had not been present at the time, could not explain what had happened. The operator asked to speak with someone else, and J.O. went outside to look for defendant. He found defendant at the side

of a shed on the property. Defendant appeared to be "digging something or looking for something or something." J.O. told defendant someone wanted to talk to him, but defendant refused to take the phone. J.O. returned to the mobile home and waited for emergency personnel to arrive.

Deputy Greg Walker was dispatched to the victim's residence at 12:54 p.m. He walked inside the mobile home and found blood all over the victim and C.O., as well as on the floor and the walls. He asked C.O. what had happened, and she said there had been a fight.

Other officers arrived and searched the area for defendant. Approximately two hours after officers first arrived on the scene, they discovered defendant lying on the backseat of a car parked 70 feet from the front of the residence. Defendant had two large lacerations on the web of his right hand. The officers asked defendant for the knife he had used, and defendant took them to the place nearby where he had buried it.

Defendant was interviewed at 6:23 p.m. that evening. He claimed the victim had come into the mobile home and started yelling at him and telling him to get out. According to defendant, the victim then attacked him and defendant responded by grabbing the knife and stabbing him. Defendant claimed the victim grabbed for his neck and "had a hell of a hold on [defendant]." Defendant asserted that when he started stabbing the victim, he just could not stop. Defendant claimed he and the victim were standing when the assault started but that the

victim pushed him onto the bed and defendant kept stabbing until the victim let go and fell to the floor. Defendant told the officers C.O. entered the mobile home after the victim hit the floor.

By way of background, defendant told the officers he had been robbed and beaten up while living on the streets and that the victim had attacked him in the mobile home a couple of weeks earlier but defendant had defused that situation by going outside. Defendant also explained the victim had been treating defendant's mother badly. Defendant said he had placed the knife on a desk nearby in case he needed to use it. He claimed he needed the knife because he was much smaller than the victim and he did not know what the victim might do because the victim was schizophrenic. At the time, the victim was 51 years old, five feet nine inches tall, and weighed 160 pounds. Defendant was 24 years old, approximately five feet six inches tall and weighed 130 pounds.

Later in the interview, defendant indicated the victim had not actually grabbed defendant's neck before defendant used the knife on him. Defendant said instead the victim had grabbed him around the stomach area. Defendant said he picked up the knife as the victim was coming at him.

Defendant explained he somehow cut his own hand while stabbing the victim. Defendant claimed that, after the assault, he panicked and hid the knife. He also said he hid in the car because he figured "they" would find him using helicopters if he tried to run. Defendant indicated: "I know I fucked up, dude,

I started stabbing him and I don't know what to tell you guys, I really don't."

Dr. Susan Comfort, the forensic pathologist who performed the autopsy, testified she could not tell in what order the 18 stab wounds had been inflicted. She explained that one of the neck wounds penetrated an artery and caused most of the blood loss. The cause of death was loss of blood from multiple stab wounds.

Kenton S. Wong, a defense expert, testified that the location and dimensions of the wounds indicate they had to have been inflicted in quick succession with the knife being used with the same repeated motion while the victim was moving around. Wong further testified the blood pattern on the victim's shirt shows he was upright when the wounds were inflicted.

A DNA expert testified defendant could not be eliminated as a match for DNA found on fingernail clippings taken from the victim's left hand.

DISCUSSION

I

Sufficiency of the Evidence - Premeditation

Any murder that is "willful, deliberate, and premeditated" is murder of the first degree. (Pen. Code, § 189.)

Defendant contends the evidence is insufficient to support the first degree premeditated murder conviction. He argues the prosecution acknowledged defendant acted "rashly" and engaged in

a “rage stabbing.” Nevertheless, the prosecution’s theory of first degree murder was that defendant had time to deliberate and premeditate between the first and last stab wounds, because it takes time to inflict 18 stab wounds, time that allowed defendant “‘to weigh the pros and cons, to deliberate on his actions and stop.’” Defendant argues this theory is “unreasonable and legally untenable,” because “[a]n enraged person cannot engage in the kind of careful weighing of considerations necessary to come to a cold and calculated decision.”

Defendant’s argument relies primarily on a legal theory that, because the prosecution introduced defendant’s police interview in which he claimed the victim was the aggressor and he was just defending himself, the prosecution was bound by that version of the incident. Defendant cites as support *People v. Toledo* (1948) 85 Cal.App.2d 577 (*Toledo*) where, according to defendant, Toledo admitted killing the deceased but claimed it was in self-defense and there was no other evidence that Toledo was responsible for the killing. Defendant asserts the Court of Appeal in *Toledo* concluded the evidence was insufficient to support a manslaughter conviction because, “in the absence of contrary evidence, the prosecution was bound by the exculpatory evidence it had presented.”

The supposed conclusion of the court in *Toledo* is actually taken from a recitation of an argument that was raised by defendant Toledo on appeal. The defendant had asserted in his appellate brief “‘[t]he prosecution having presented as a part

of its case the statement of the defendant which justified the homicide is bound by that evidence in the absence of proof to the contrary.'" (*Toledo*, *supra*, 85 Cal.App.2d at p. 581.) In *Toledo*, there was in fact other evidence supporting the defendant's self-defense theory.

At any rate, in *People v. Burney* (2009) 47 Cal.4th 203 (*Burney*), the California Supreme Court explained that the so-called *Toledo* doctrine is based on an antiquated theory of vouchsafing for one's witnesses. In *Burney*, the trial court refused to give a requested instruction that the prosecution, having presented the defendant's statement to prove its case, was bound by that statement in the absence of proof to the contrary. (*Burney, supra,* at p. 248.) The Supreme Court found no error, explaining:

"In the present case, the trial court properly refused to give the special instruction requested by the defense. Opinions rendered by the Courts of Appeal subsequent to *Toledo* demonstrate that its holding has been superseded at least in part. 'First, the so-called *Toledo* doctrine (whose genesis seems to have been merely an argument offered on appeal) actually refers to a principle of judicial review invoked in homicide prosecutions obviating a defendant's burden of showing mitigation or justification where the prosecution's proof itself tends to show same or a lesser unlawful homicide. [Citations.] . . . To the extent that the doctrine is founded upon a notion that the prosecution is bound by their witnesses' statements [citation] on the antiquated theory

of vouchsafing one's own witnesses [citation], that theory has long since been discarded in favor of the modern rule allowing impeachment of a witness by any party, "including the party calling him." (Evid. Code, § 785; *People v. Chacon* (1968) 69 Cal.2d 765, 779.) In the final analysis the question of defendant's guilt must be resolved from *all* the evidence considered by the jury.' (*People v. Ross* (1979) 92 Cal.App.3d 391, 400, fn. omitted.)" (*Burney*, *supra*, 47 Cal.4th at p. 248.)

Defendant argues the *Toledo* doctrine remains a viable principle of law applicable to reviewing courts and "is consistent with the substantial evidence test which requires the court to examine the evidence 'in light of the whole record -- i.e., the entire picture of the defendant put before the jury -- and may not limit [the] appraisal to isolated bits of evidence selected by the respondent.'" But to the extent the so-called *Toledo* doctrine is consistent with the basic substantial evidence test, it really adds nothing to the equation. The prosecution is not bound by the exculpatory portions of defendant's statement but may rely on any available conflicting evidence.

Under the substantial evidence test, we view the evidence in the light most favorable to the prosecution and determine if a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. (*People v. Davis* (1995) 10 Cal.4th 463, 509.) In doing so, we review the entire record, including evidence both favorable and unfavorable to the

defendant. "In determining whether a judgment is supported by substantial evidence, we may not confine our consideration to isolated bits of evidence, but must view the whole record in a light most favorable to the judgment, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the decision of the trial court. [Citation.] We may not substitute our view of the correct findings for those of the trial court; rather, we must accept any reasonable interpretation of the evidence which supports the trial court's decision. However, we may not defer to that decision entirely. '[I]f the word "substantial" means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with "any" evidence. It must be reasonable in nature, credible, and of solid value; it must actually be "substantial" proof of the essentials which the law requires in a particular case.' [Citations.]" (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1203-1204.)

Under the substantial evidence test, we accept defendant's self-serving statements regarding the circumstances of the killing *in the absence of contrary evidence*. But where there is substantial evidence that the killing was not in self-defense, defendant's statements are not controlling. With the proper standard in mind, we now turn to the merits of defendant's argument.

"A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill.

[Citation.] ‘Deliberation’ refers to careful weighing of considerations in forming a course of action; ‘premeditation’ means thought over in advance. [Citations.]” (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

Our inquiry into the sufficiency of the evidence to support a finding of premeditation and deliberation is informed by *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*). As the California Supreme Court observed in *People v. Sanchez* (1995) 12 Cal.4th 1 (*Sanchez*), disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22: “[W]e apply the tripartite test of [*Anderson*] in deciding whether the evidence is sufficient to support a finding of premeditation and deliberation based on these three factors: (1) planning activity; (2) motive (established by a prior relationship and/or conduct with the victim); and (3) manner of killing. [Citations.] ‘[T]his court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3).’ (*Anderson*, *supra*, 70 Cal.2d at p. 27.)

“We have recently explained that the *Anderson* factors do not establish normative rules, but instead provide guidelines for our analysis. In *People v. Thomas* (1992) 2 Cal.4th 489, 517 we observed: ‘The *Anderson* analysis was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations. It did not refashion

the elements of first degree murder or alter the substantive law in any way.'

"Thereafter, in *People v. Perez* (1992) 2 Cal.4th 1117, 1125 . . . , we reiterated the *Thomas* statement, and added that '[t]he *Anderson* guidelines are descriptive, not normative. [Citation.] The goal of *Anderson* was to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse. [Citation.] [¶] In identifying categories of evidence bearing on premeditation and deliberation, *Anderson* did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation. . . . The *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive.' [Citation.]

"Finally, we have recognized that it is not necessary that the *Anderson* 'factors be present in some special combination or that they be accorded a particular weight.' [Citation.] Nonetheless, we are guided by the factors in our determination whether the murder occurred as a result of 'preexisting reflection rather than unconsidered or rash impulse.'" (*Sanchez*, *supra*, 12 Cal.4th at pp. 32-33.)

Defendant contends there is no evidence of planning activity. Defendant acknowledges he had his pocket knife open and ready for use before the victim came at him. However, he

argues he had the knife ready only in case it was needed for defensive purposes. He further argues the prosecution claimed this was a rage stabbing, and "[i]t is illogical to say that someone can plan a 'rage stabbing.'"

Regarding the latter point, the People respond that defendant claimed the victim had attacked him two weeks earlier but defendant had defused the situation by walking away. The People argue "the jury could reasonably infer that [defendant], already angered at the way Pesci was treating him, had decided that if Pesci 'did it again,' [defendant] was going to stab him." Thus, according to the People, "[t]he fact that [defendant] may have been enraged at the time of the actual stabbing does not negate planning beforehand."

We agree. One who knows certain conduct by a person tends to enrage him is certainly capable of planning to retaliate the next time it occurs. A reasonable jury could conclude defendant resented the way he had been treated by the victim two weeks earlier and how defendant was forced to, in effect, retreat from the confrontation. The jury could conclude defendant made up his mind not to retreat the next time and made sure he got the upper hand by having a knife readily available.

The jury was free to disregard defendant's self-serving claim that he had the knife ready for use solely for defensive purposes. As the prosecutor pointed out in closing argument, the only evidence that defendant was defending himself came from his own statements. All of the victim's stab wounds were in his back or in the back or side of his head and neck area. The

prosecutor argued defendant had in fact caught the victim by surprise and stabbed him from behind. The prosecutor further argued the nature of some of the stab wounds was such that they could not have been inflicted by one standing in front of the victim and reaching around behind the victim's back. Except for defendant's self-serving statements to police, there was no evidence to contradict the prosecution's theory. Neither defendant nor C.O. testified at trial.

Defendant contends there was no evidence he had a preexisting motive to kill the victim. Defendant acknowledges the prosecution argued he was motivated to kill the victim so he would not have to worry about being kicked out of the home or the victim mistreating his mother. However, defendant argues the prosecution "conceded that these were minor, trivial concerns."

Even if an actor's motivation may seem minor or trivial, it does not mean it did not nevertheless animate his actions. Most rational people would require an extreme motivation to warrant taking another's life. However, murderers are not necessarily like other people. In an age where one person shoots another simply for showing him a lack of "respect," changing lanes, or failing to surrender his property quickly enough, who can say if a particular motivation is too trivial to be considered? Defendant clearly had a motivation for wanting the victim out of the way.

As for the final *Anderson* factor, the manner of killing, defendant again argues this shows he acted in self-defense and

not pursuant to a plan. Defendant asserts there was no evidence to show he attacked the victim without provocation. Instead, the only evidence on the subject, i.e., defendant's statements to the police, showed the victim was the aggressor.

But here again, defendant relies on the *Toledo* doctrine which, as we have explained, does not saddle the prosecution with defendant's rationalization for the killing. Defendant argues there is no evidence to refute that the victim was the aggressor. That is not true. E.O. testified that, during the first phone call, she could hear the victim saying, "Why did you let him?" This suggests that at least the victim viewed the situation as one in which his wife allowed her son to attack him. This is further supported by C.O.'s statements to J.O. when he entered the mobile home, asking J.O. to help her get the victim into the shower and clean him up and saying she did not want anyone to go to prison. These statements suggest that C.O. likewise did not consider what had happened as self-defense.

The prosecution relied on the fact that the victim received 18 stab wounds to show defendant had sufficient time between the start of the assault and the final blow to deliberate on what he was doing. The prosecution also relied on the location and depth of the wounds to show defendant was not just fending off the victim but was trying to kill him.

Defendant argues the manner of killing shows there was no deliberation. Defendant told the police, "I didn't want to hurt him, man, I just . . . [¶] . . . [¶] when I started stabbing him, I just could not stop." Defendant points out there was no

evidence of a break in the stabbings. His expert testified the nature of the wounds was such that they were inflicted in a short period of time.

But here again defendant relies primarily on his self-serving statements that the victim came at him, he stabbed the victim while facing him and reaching around the victim's back, and once defendant started stabbing the victim he could not stop.

However, the prosecution argued the stabbing could just as easily have occurred by defendant attacking the victim from behind. A prosecution expert testified she could not imagine how several of the wounds could have been inflicted with the victim facing defendant. And the location of the stab wounds--in the victim's back and the back of his neck and head area--suggests an intent to kill rather than an intent to defend. A prosecution expert testified that one using a knife to fend off an attack would more likely stab the front of the attacker in nonvital areas than reach around and stab him or her in the back.

As for the short duration of the stabbings, the California Supreme Court recently observed: "'"Premeditation and deliberation can occur in a brief interval. 'The test is not time, but reflection. "Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly."'" [Citation.]' [Citations.]" (*People v. Solomon* (2010) 49 Cal.4th 792, 812.) "'The true test is not the duration of time as much as it is the extent of the reflection.'

[Citations.] We have observed that '[t]houghts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' [Citation.]" (*Id.* at p. 813.)

But even if the manner of killing did not suggest premeditation, the record still contains evidence of motive coupled with planning activity. Under *Anderson*, this is enough to support the jury's finding. The jury was properly instructed on the element of premeditation and deliberation and returned a verdict of guilty to first degree murder. In light of the evidence in the record, there is no justification for taking that decision away from the jury.

II

Sufficiency of the Evidence - Murder

Once again relying on the *Toledo* doctrine, defendant contends his murder conviction must be reversed because his statements to police established the killing was in self-defense or, at most, voluntary manslaughter on the basis of heat of passion or imperfect self-defense.

As explained in part I of the Discussion, the prosecution was not bound by defendant's version of the incident. The so-called *Toledo* doctrine is based on an "'antiquated theory of vouchsafing one's own witnesses,'" a theory that has long since been discarded. (*Burney*, *supra*, 47 Cal.4th at p. 248.)

Defendant contends that, under California law, one has a right to use deadly force to defend against any violent felony that threatens death or great bodily injury. He argues the

victim came at him with both arms raised to grab his throat and that, under *People v. Covino* (1980) 100 Cal.App.3d 660 (*Covino*), this qualifies as such a violent felony. According to defendant, the Court of Appeal in *Covino* held that choking a victim with two hands is a felonious assault likely to produce great bodily injury, regardless of whether such injury occurs.

There are a number of problems with defendant's argument. First, the notion that the victim attempted to choke defendant comes from defendant's own statements, which the jury was free to discount. Further, defendant himself later changed his story, saying the victim came at him with arms raised but did not grab his throat, instead grabbing his midsection. At any rate, defendant misstates the holding in *Covino*. The court there did not hold that choking a defendant with two hands is a felonious assault authorizing the use of deadly force in response. The holding of the court in *Covino* was that, where there is a felonious assault, actual injury is not required. (See *Covino*, *supra*, 100 Cal.App.3d at pp. 667-668.)

Defendant next argues the victim was attempting to forcibly eject him from the mobile home which, he argues, was a felonious kidnapping, warranting his resistance with deadly force. As support for his novel theory that forcibly ejecting someone from a residence is a kidnapping, defendant cites *People v. Martinez* (1999) 20 Cal.4th 225 (*Martinez*). He argues the high court in *Martinez* found sufficient evidence of a kidnapping where the defendant, who rented a room in a residence, forced a coresident out of the house at knifepoint.

Martinez did not involve an ejection from a residence. The defendant in *Martinez* walked the victim out of her house, across a 15-foot porch, and across a backyard and parking area before police responding to the scene intervened. (*Martinez, supra,* 20 Cal.4th at pp. 229-230.) In other words, it was not ejection of the victim from the residence that amounted to a kidnapping but the forcible asportation of the victim for a sufficient distance.

At any rate, in the present matter, defendant told the investigating officers the victim *ordered* him out of the residence. There is no evidence the victim tried to forcibly eject defendant.

Defendant next contends the circumstances of the killing demonstrate he acted under a sudden quarrel or heat of passion, which eliminates the element of malice and reduces the offense to voluntary manslaughter. However, "'[i]t is not enough that provocation alone be demonstrated. There must also be evidence . . . that defendant's reason was in fact obscured by passion at the time of the act.'" (*People v. Dixon* (1995) 32 Cal.App.4th 1547, 1552.) The provocation or heat of passion "must be such as would arouse feelings of pain or rage in 'an ordinarily reasonable person' or 'an ordinary man of average disposition.'" (*People v. Balderas* (1985) 41 Cal.3d 144, 196.)

Here again, defendant relies on the *Toledo* doctrine to establish the facts underlying his heat of passion theory. The jury was instructed on this theory and was told the provocation must have been sufficient to invoke the passions of a reasonable

man. The jury was also told the prosecution has the burden of disproving this theory. The jury returned a verdict of guilty to murder, necessarily rejecting the heat of passion theory. In light of the evidence discussed earlier, as well as evidence that defendant did not stick around to render aid to the victim and tried to hide the knife as well as himself after the killing, substantial evidence supports the jury's conclusion in this regard.

Defendant contends the circumstances of the killing alternatively show he acted under an honest but unreasonable belief in the need for self-defense, which too eliminates the element of malice and reduces the offense to voluntary manslaughter. (See *People v. Blakeley* (2000) 23 Cal.4th 82, 87-88; *People v. Flannel* (1979) 25 Cal.3d 668, 674.)

But here again, the jury was instructed on this theory and rejected it. Under the totality of the evidence presented, the jury could reasonably conclude defendant did not have an honest belief in the need for self-defense.

III

Instruction on the Right to Resist a Felony

The trial court instructed the jury on self-defense (CALCRIM No. 505) as follows:

"The defendant is not guilty of murder or manslaughter if he was justified in killing someone in self-defense. The defendant acted in lawful self-defense if one, the defendant reasonably believed that he was in imminent danger of being

killed or suffering great bodily injury. Two, the defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger. And three, the defendant used no more force than was reasonably necessary to defend against that danger.

"Belief in future harm is not sufficient no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of great bodily injury to himself. The defendant's belief must have been reasonable and he must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the killing was not justified.

"When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant, and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed. If you find that Valentine [Pesci] threatened or harmed the defendant in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.

"Someone who has been threatened or harmed by a person in the past is justified in acting more quickly or taking greater self-defense measures against that person. A defendant is not required to retreat. He or she is entitled to stand his or her

ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of death has passed. This is so even if safety could have been achieved by retreating.

"Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. The People have the burden of proving beyond a reasonable doubt that the killing was not justified. If the People have not met this burden, you must find the defendant not guilty of murder or manslaughter."

Defendant contends the foregoing instruction was incomplete. He argues that, in addition to instructing that he had a right to defend against a threat of death or great bodily injury, the court was required to instruct that he had a right to defend against the commission of any felony that posed a danger of serious bodily harm. As explained in part II, *ante*, defendant contends his version of the incident proved the victim attempted to commit two such felonies, aggravated assault involving choking and kidnapping.

Defendant did not request such an instruction. "A trial court has a duty to instruct the jury 'sua sponte on general principles which are closely and openly connected with the facts before the court.' [Citation.] . . . [A] trial court has a sua sponte duty to give instructions on the defendant's theory of the case, including instructions 'as to defenses "'that the defendant is relying on . . . , or if there is substantial evidence supportive of such a defense *and* the defense is not

inconsistent with the defendant's theory of the case.'"' [Citation.]" (*People v. Abilez* (2007) 41 Cal.4th 472, 517.)

In the present matter, the trial court instructed the jury on defendant's primary theory of self-defense. Defendant contends the court did not do so adequately. But where a party claims on appeal that a legally correct instruction was too general or incomplete, and in need of clarification or amplification, the party must show that he requested modification, clarification or amplification in the trial court; otherwise the contention is forfeited. (*People v. Valdez* (2004) 32 Cal.4th 73, 113; *People v. Hart* (1999) 20 Cal.4th 546, 622; *People v. Daya* (1994) 29 Cal.App.4th 697, 714.)

At any rate, as explained in the preceding part, defendant cites no authority for his argument that he was entitled to use deadly force to repel an attempt to choke him. The case he cites, *Covino*, did not so hold. And defendant's novel theory that expelling someone from a residence amounts to kidnapping is without merit.

IV

Voluntary Manslaughter Instructions

Defendant's fourth claim of error is captioned, "Failure to Instruct on Involuntary Manslaughter as a Lesser Included Offense Based on a Theory of Assault With a Deadly Weapon Without Malice." However, in the body of the argument, defendant repeatedly uses involuntary manslaughter and voluntary manslaughter interchangeably. A close look at the substance of

defendant's argument reveals he is actually claiming failure to instruct on an alternate theory of *voluntary* manslaughter.

The jury was instructed on voluntary manslaughter both on a theory of sudden quarrel or heat of passion and on a theory of imperfect self-defense. Defendant contends the court was also required to instruct on a theory of unintentional killing during the commission of an assault with a deadly weapon.

Defendant's theory is an offshoot of the felony murder rule. "The felony-murder rule makes a killing while committing certain felonies murder without the necessity of further examining the defendant's mental state. The rule has two applications: first degree felony murder and second degree felony murder. . . . First degree felony murder is a killing during the course of a felony specified in [Penal Code] section 189, such as rape, burglary, or robbery. Second degree felony murder is 'an unlawful killing in the course of the commission of a felony that is inherently dangerous to human life but is not included among the felonies enumerated in [Penal Code] section 189 . . . .' [Citation.]" (*People v. Chun* (2009) 45 Cal.4th 1172, 1182.)

Under the merger doctrine, an offense that is an integral part of a homicide cannot be the basis of a felony murder conviction. (*People v. Ireland* (1969) 70 Cal.2d 522, 539.) Assault with a deadly weapon is a felony inherently dangerous to human life. (*People v. Garcia* (2008) 162 Cal.App.4th 18, 28, fn. 4.) However, where the underlying dangerous felony is an aggravated assault, the merger doctrine precludes use of the

felony-murder rule. (*Id.* at p. 29.) Such a homicide may instead be voluntary manslaughter. (*Id.* at p. 31.)

In the present matter, defendant argues that, if the jury rejected self-defense, the circumstances as described by him demonstrate he committed voluntary manslaughter, because the death was unintentional and occurred during the commission of an assault with a deadly weapon. Defendant argues the court not only failed to instruct on this theory, but precluded it by instructing the jury that proof of malice is necessary for voluntary manslaughter.

But here again, defendant failed to request an instruction on this theory. We are not surprised. Such a theory would have required defendant to convince the jury that, while intentionally committing an assault with a deadly weapon, he nevertheless did not intend to kill the victim, despite the fact he stabbed the victim 18 times in various vital areas of the body.

A trial court has a sua sponte duty to instruct on a particular defense if it appears that the defendant is relying on the defense or if there is substantial evidence supporting the defense and the defense is not inconsistent with the defendant's theory of the case. (*People v. Sedeno* (1974) 10 Cal.3d 703, 716, overruled on other grounds in *People v. Flannel*, *supra*, 25 Cal.3d at p. 684, fn. 12.) In the present matter, defendant's theory of the case was that he did not intentionally assault the victim with a knife but instead acted in self-defense. A theory that defendant intentionally

assaulted the victim but without intent to kill would be inconsistent. Defendant was therefore required to request an instruction on such a theory. Having failed to do so, he has forfeited the alleged instructional error for purposes of review.

V

Consciousness of Guilt Instructions

The jury was given the following flight instruction pursuant to CALCRIM No. 372: "If the defendant fled or tried to flee immediately after the crime was committed, that conduct may show he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove his guilt."

The jury was also instructed on false statements by defendant, pursuant to CALCRIM No. 362: "If the defendant made a false or misleading statement relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of the guilt of his crime and you may consider it in determining his guilt. If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

Defendant contends neither instruction was appropriate in this instance. He argues there is no evidence he fled from the scene. On the contrary, he was ultimately discovered in a car

not more than 70 feet from the front door of the residence. Defendant further argues none of his statements to the police were shown to be false.

Defendant reads the word "flight" too literally. The critical inquiry is not whether defendant departed from the premises but whether he took steps to avoid apprehension. "[F]light 'requires neither the physical act of running nor the reaching of a faraway haven' but it does require 'a purpose to avoid being observed or arrested.'" (*People v. Jurado* (2006) 38 Cal.4th 72, 126.) In this instance, defendant hid himself in the back of a car on the premises rather than wait around for the authorities and explain what happened. Such an act demonstrates a consciousness of guilt. Defendant told the interviewing officers he did not run because he assumed "they" would catch him using a helicopter. In other words, defendant considered he had a better chance of avoiding apprehension by hiding than by running.

An instruction in substantially the form of CALCRIM No. 372 must be given whenever the prosecution relies on evidence of flight to show a consciousness of guilt. (Pen. Code, § 1127c.) The instruction is intended to protect the defendant, by informing the jury evidence of flight alone is not sufficient to prove guilt. The instruction was properly given here.

As for the instruction on false or misleading statements, this was warranted by inconsistencies in defendant's own version of what happened. Defendant claimed the victim grabbed for his neck. Later, defendant indicated the victim did not grab his

neck but grabbed him around the middle. Defendant claimed he was sitting on the bed when he stabbed the victim. Defendant then indicated he was standing when he first started stabbing the victim and was later pushed onto the bed. Defendant's expert testified the blood pattern on the victim's shirt showed he was upright when he was stabbed. Defendant claimed he acted in self-defense but later told the officers he knew he "fucked up" and told J.O. immediately after the incident that the victim came at him and he "just lost it."

As with CALCRIM No. 372, CALCRIM No. 362 is intended for defendant's benefit, to inform the jury that evidence of a false statement by defendant is insufficient to prove guilt. There was no error in giving the instruction here.

VI

Ineffective Assistance

Defendant contends he received ineffective assistance of counsel when his attorney failed to object to allegedly improper arguments by the prosecutor. However, as we shall explain, none of the challenged arguments were improper in light of the evidence presented to the jury. Furthermore, defendant cannot show his counsel lacked a tactical basis for failing to object.

Under both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution, a criminal defendant has a right to the assistance of counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668, 684-685 [80 L.Ed.2d 674, 691-692]; *People v. Pope* (1979)

23 Cal.3d 412, 422.) This right "entitles the defendant not to some bare assistance but rather to *effective* assistance." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) "To establish entitlement to relief for ineffective assistance of counsel the burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Lewis* (1990) 50 Cal.3d 262, 288.)

"In evaluating a defendant's claim of deficient performance by counsel, there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' [citations], and we accord great deference to counsel's tactical decisions. [Citation.] Were it otherwise, appellate courts would be required to engage in the '"perilous process"' of second-guessing counsel's trial strategy. [Citation.] Accordingly, a reviewing court will reverse a conviction on the ground of inadequate counsel 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.' [Citations.]" (*People* v. *Frye* (1998) 18 Cal.4th 894, 979-980, disapproved on another ground in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.)

"Generally, failure to object is a matter of trial tactics as to which we will not exercise judicial hindsight." (*People v. Kelly* (1992) 1 Cal.4th 495, 520.) "A reviewing court

will not second-guess trial counsel's reasonable tactical decisions." (*Ibid.*) "[I]n the heat of a trial, defense counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings. The choice of when to object is inherently a matter of trial tactics not ordinarily reviewable on appeal." (*People v. Frierson* (1991) 53 Cal.3d 730, 749.)

Defendant challenges his attorney's failure to object to the following argument by the prosecution on the issue of premeditation and deliberation: "What other evidence do we have that he had this state of mind, this deliberation he had to deliberately [*sic*]. Well, we come back to the number eighteen. Eighteen stab wounds. He had time between the first stab wound and the eighteenth stab wound. No matter how fast, how staccato [defense counsel] will argue to you that those stab wounds were inflicted, it takes time to inflict eighteen stab wounds. He had time to weigh the pros and the cons, to deliberate on his actions and stop. He chose not to do that. He continued. He chose to continue. He chose to kill. That, ladies and gentlemen, is deliberation."

Defendant contends this was a legally untenable argument. He argues "[i]t is legally impossible to exercise the kind of cold, calculated judgment, and careful thought and weighing of considerations that deliberation requires during the course of a rage stabbing itself." However, as explained in part I, *ante,* there is nothing legally untenable about a defendant being able to deliberate during the course of inflicting 18 stab wounds.

The question "'is not the duration of time as much as it is the extent of reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.)

Defendant next argues the prosecutor attempted to shift the burden of proof in the following argument about the significance of defendant's DNA being found on the victim's fingernails: "Ladies and gentlemen, Valentine [Pesci] was fighting for his life, I have no doubt about it. He was being stabbed with a knife. They were grappling. He was being stabbed repeatedly. I think it's reasonable for him to use his fingernails against the knife that [defendant] was using. So to that evidence, the fact that it's possible that [defendant]'s DNA is underneath Valentine [Pesci]'s fingernails, I also say so what. That doesn't add to proof beyond a reasonable doubt."

Defendant does not challenge the substance of the prosecution's argument, only the final sentence. Evidence that defendant's DNA was found on the victim's fingernails supports defendant's theory that the victim grabbed him before the stabbing. However, it also supports the prosecution's theory that the victim grabbed defendant during the struggle that ensued after the stabbing began. In other words, the evidence is inconclusive. Contrary to defendant's assertion, the final sentence of the foregoing argument does not shift the burden of proof. Instead, it asserts the DNA evidence adds nothing to the case, which was a legitimate argument in light of the evidence presented in the case.

Defendant's final claim of ineffective assistance stems from the following prosecution argument: "A number of the wounds, about seven or so of them, at least, Dr. Comfort testified were from a right to left direction; meaning they came from the right side of Mr. [Pesci]'s body and went towards the left side of Mr. [Pesci]'s body. If you think about that, . . . it's impossible for the event to have occurred the same way that the defense would have you believe." The prosecutor further argued the physical evidence did not support defendant's claim that he was attacked.

Defendant contends the prosecutor presented improper argument when he stated it was "impossible" for the events to have occurred as defendant claimed. We disagree. A prosecutor has wide latitude in closing argument and may argue vigorously that the evidence shows the defendant is guilty of the crimes charged. (*People v. Mincey* (1992) 2 Cal.4th 408, 447-448; *People v. Wharton* (1991) 53 Cal.3d 522, 567.) In other words, the prosecution may argue the evidence in the light most favorable to its case.

The prosecution expert, Dr. Susan Comfort, testified about each of the 18 stab wounds. Wound number five was on the back of the victim's neck and followed a course from the right to the left side of the victim's body and downward. Dr. Comfort indicated such a wound is inconsistent with a scenario whereby the assailant was standing in front of the victim and reaching around the victim's back with his right hand. Although she did not say it would be impossible, Dr. Comfort testified the wound

"would be very difficult to achieve" in that way. Dr. Comfort was also asked about wounds six through 10 and indicated they were in the same direction as wound number five. Presumably, those wounds too would have been difficult to achieve while facing the victim.

Assuming the prosecutor overstated his case in arguing it would have been *impossible* for the wounds to be inflicted as defendant described, there is nevertheless evidence from which the jury could conclude such a scenario would have been "very difficult to achieve." Under such circumstances, we cannot say defense counsel was ineffective in failing to object and thereby highlighting the prosecution's argument. In other words, we cannot say defense counsel could have had no tactical basis for failing to object.

In light of the foregoing, we cannot say defense counsel rendered ineffective assistance in failing to object during the prosecutor's argument.

VII

Penal Code Section 4019

The recent amendments to Penal Code section 4019 do not operate to modify defendant's entitlement to presentence credit, as he was committed for a serious felony. (Pen. Code, § 4019, subds. (b)(2) & (c)(2); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

NICHOLSON, Acting P. J.

ROBIE, J.